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Integrated Electrical Services, Inc., d/b/a Primo Electric and International Brotherhood of Electrical Workers, Local 24, AFL-CIO. Case 5-CA-31829

October 24, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On February 10, 2005, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs,¹ and has decided to affirm the judge's rulings, findings,² and conclusions, as discussed below, and to adopt the recommended Order as modified.³

The judge found that Respondent Primo Electric violated Section 8(a)(3) and (1) by terminating the employment of master electrician William Hughes on October 10, 2003, because he engaged in protected union activity.⁴ We agree. Under the analysis established in *Wright Line*,⁵ the judge found that the General Counsel showed,

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the record, we are satisfied that the Respondent's contentions are without merit.

³ We will modify the judge's recommended Order in accordance with the Board's standard remedial language for employer unfair labor practices.

⁴ All dates are 2003 unless otherwise indicated.

⁵ 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To prove a violation of Sec. 8(a)(3) under *Wright Line*, the General Counsel must first show discriminatory motive, by a preponderance of the evidence, by offering evidence that the employer was aware of the employee's protected activity and that animus against that activity motivated the employer's alleged discrimination. The burden then shifts to the employer to demonstrate that the same action would have occurred even in the absence of protected conduct. See, e.g., *KFMB Stations*, 343 NLRB No. 83, slip op. at 4 (2004).

Chairman Battista concurs in the result, albeit with a different rationale. It is clear that the Respondent's reasons for the discharge were

by a preponderance of the evidence, that Hughes' protected activity was a motivating factor in the Respondent's decision to discharge him.⁶ The judge further found that the Respondent's alleged nondiscriminatory reasons for discharging Hughes were pretextual and that the Respondent would not have discharged Hughes in the absence of his protected activity.⁷

In adopting the judge's conclusions, we note the judge's finding that Respondent's human relations director, Perini, at the time she fired Hughes, did not have a good-faith belief that he had engaged in misconduct. Despite this finding, the judge, citing *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), and *Keco Industries*, 306 NLRB 15, 17 (1992), alternatively found that even if Perini did have such a good-faith belief, Hughes' discharge would be unlawful because Hughes was engaged in protected activity and did not engage in misconduct. In light of the judge's initial finding that Perini did not have a good-faith belief that Hughes had engaged in misconduct, we find that *Burnup & Sims* and its progeny do not apply to the facts of this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Integrated Electrical Services, Inc., d/b/a Primo Electric, Glen Burnie, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b):

the distribution of the pronoun CD and the alleged lying about it. Thus the issue is not motive but rather whether Hughes engaged in misconduct during the course of that union activity, i.e. whether the distribution was on work time. Accordingly, the *Wright Line* test for determining motive is unnecessary. Compare *Banta Catalog Group*, 342 NLRB No. 132 (2004), where the employer's asserted reason was "pretextual." Rather, the issues are (1) whether the Respondent had a good-faith belief that Hughes engaged in the misconduct and (2) if Respondent had such a belief, whether Hughes in fact engaged in the misconduct. See *Rubin Bros. Footwear*, 99 NLRB 610 (1952) (as here, an 8(a)(3) case). In the instant case, the Respondent did not even show that it had a good-faith belief that Hughes engaged in misconduct.

⁶ Member Schaumber agrees that the General Counsel established a prima facie case of discrimination under *Wright Line*. In so finding, Member Schaumber finds it unnecessary to rely on the September 2 OSHA complaint as evidence of Respondent's antiunion animus.

⁷ In finding pretext, the judge relied, in part, on testimony about a statement made by Respondent's counsel during an interview with employee Clayton Bester. The Respondent excepted to admission of the testimony on the grounds that the statement was protected by the attorney-client privilege and the work-product doctrine. We find sufficient evidence in the record, aside from the disputed testimony, to show that Respondent's justifications for discharging Hughes were pretextual. We therefore find it unnecessary to rely on the disputed testimony or to decide whether the statement was privileged.

“(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

Dated, Washington, D.C. October 24, 2005

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

James C. Panousos, Esq., for the General Counsel.

Douglas M. Nabhan, Esq., and *Aaron S. Walters, Esq.*, of Richmond, Virginia, for the Respondent.

John M. Singleton, Esq., of Owings Mills, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Baltimore, Maryland on September 28 and 29, 2004. The charge was filed on March 24, 2004, by the International Brotherhood of Electrical Workers, Local 24, AFL-CIO (the Union or Local 24) against Integrated Electrical Services, Inc., d/b/a Primo Electric (Respondent). The complaint issued on June 21, 2004, and alleges, as amended at the hearing, that Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee William Hughes on October 10, 2003, because he joined, formed, and/or assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.¹

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT²

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Glen Burnie, Maryland has been engaged in the busi-

ness of providing electrical and communications services. During the past 12 months, a representative period, Respondent performed services valued in excess of \$50,000 in states other than Maryland. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 24 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At the time of the hearing, Darcia Perini was working for Respondent as a human resource director and facilities security supervisor. Perini oversees Respondent's hiring and firing of employees. Perini testified that she conducts investigations for possible terminable offenses, and she made the decision to discharge Hughes. Respondent admits that Perini, Richard Plitt, division superintendent, Keith Hogge, superintendent, and Michael Gunzelman, foreman/superintendent are, at times relevant, its supervisors and agents within the meaning of Section 2(11) and 2(13) of the Act.

A. Respondent's Employment of William Hughes, Sr.

Hughes is a member of Local 24. Hughes started his union apprenticeship in 1964, and has been a licensed master electrician with the State of Maryland for 25 to 30 years. Hughes started his own business, a nonunion company, in the 1980's. Hughes rejoined Local 24 in 2001 or 2002, as a journeyman wireman, and remained a member in good standing. Hughes has not held union office. Hughes is in his early 60's and had been diagnosed with asbestosis in the beginning of 2003. Hughes illness limits his lung capacity, but he maintained that, "I can work just like anybody else." As a result of his condition, Hughes began using an inhaler three to four times a day while working for Respondent. Despite this diagnosis, Hughes also smoked around a pack of cigarettes a day while in Respondent's employ.

Local 24 Assistant Business Manager Roger Lash told Hughes Respondent was hiring and Hughes applied for employment around mid-July. Before starting to work for Respondent, Hughes received organizer training by attending Local 24 classes. Hughes testified that, during the classes, he was told concerning handing out union materials that, "It was always to be done off the work site, and before work or after work." Hughes was instructed in the training to keep a log about occurrences at his employer, and he testified that he kept such a log while employed by Respondent where he made the entries on a daily basis after work.

Hughes was hired by Respondent and began work on August 11. At the outset of his employment, Hughes was given a copy of Respondent's employee handbook. Section 6.2 of the handbook is entitled, "Unacceptable Job Performance and Disciplinary Action." It provides in pertinent part that, "Failure to comply with any of the following rules may subject the employee to disciplinary action, up to and including termination." The provision goes on to state, "Some of the prohibited activities/conduct which may lead to disciplinary action include but are not limited to:" and among those items listed is "Dishonesty." The handbook provides that, "All unacceptable behavior, as determined solely by Primo, may lead to immediate dis-

¹ All dates are in 2003, unless otherwise specified.

² In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony has been considered, if certain aspects of a witnesses' testimony are not mentioned it is because it was not credited, or cumulative of the credited testimony set forth above. Further discussions of the witnesses' testimony and credibility are set forth throughout this decision as warranted.

missal from employment. However, to the extent possible, Primo will seek to provide employees with a verbal and/or written warning prior to dismissal for unacceptable job performance or a violation of work rules.” The handbook also contains a no-solicitation and no-distribution rule.³ Respondent’s Handbook Section 9.10 is entitled, “Unions”. It reads in pertinent part:

Primo does not have a union; therefore, no one is required to be a member of a union to work here. Employees have been satisfied with this arrangement. There is no discrimination because a person is or is not a union member.

All employees are treated fairly, and an employee who is now a member or becomes a member of a union in the future should expect no more than an employee who is not a union member. Unions have provided none of the salaries and benefits at Primo, and it is not expected that they will help improve any benefits in the future. What the future can be and the success that will come will depend on what each employee does, individually and collectively, with his or her opportunities.

Solicitation will be allowed consistent with Primo’s policy as reflected in section 10.8 of this Handbook. However, intimidation or coercion of any employee for any reason will not be condoned. Primo will resist any efforts to bring a union into the Company by all legal means at its disposal.

On August 12, Hughes’ first day in the field, Hughes was assigned to Respondent’s Naval Academy jobsite, where he worked on revamping the temporary lights and outlets. He was working with one other employee at the time. While Hughes was at the Naval Academy, he received his assignments from Foreman Kendall Lemons. Hughes’ log reveals, as confirmed by his testimony, that at the end of the day, Lemons told Hughes and the other employee, that not enough work had been completed, and that they had to work harder and faster tomorrow. On August 14, Lemons also told Hughes and his coworker that they were not working fast enough.

Hughes’ log reveals that on August 19, Hughes and Lemons were transferred to Respondent’s Naval Stadium site. At that job, Lemons was working with his tools, and Gunzelman was the foreman. Hughes wrote in his log that Gunzelman “was not liked by anyone. He demeans most everyone at least once a day. Really arrogant and nasty.”

Hughes testified that, “He hollered, screamed, carried on, called people names. He demeaned people day in and day out.” Hughes testified Gunzelman did this to everyone. Hughes worked on skyboxes at the stadium where he installed fluorescent lighting, and hooked up heaters and air conditioners.

On August 21, Hughes’ log reflects that Gunzelman made two “nasty remarks” to Hughes in the morning, but that later in the day Gunzelman complemented the quality of Hughes’ work. Hughes notes read that, “At this time I said to him that

that was the first nice thing he has said to me. I then said that I thought he had a personality problem with me. I then told him I’m not able to run around like the 20 year olds he has but I work steady all day long. He seemed fine with this and I didn’t see him the rest of the day.” Hughes’ log reflects that he became ill from the heat on August 22, and that he left work at lunchtime.

Hughes had no daily log for August 26.

1. On August 27, Hughes is sent home for wearing a union T-shirt

Hughes daily log reveals that on August 27, he reported to work wearing a union T-shirt at the Naval Stadium. The shirt names Local 24, and states “UNION YES.” The shirt reads, “ASK ME ABOUT MY UNION,” and provides a phone number for employees to call.

It states, “FAMILY HEALTH CARE, PAID RETIREMENT, HIGHER WAGES, AND JOB SAFETY.” Hughes testified that, until that time, Respondent’s personnel did not know he was for the Union. Hughes arrived at the jobsite at 6:30 a.m. on August 27. Hughes walked on to the site with the T-shirt on. Hughes credibly testified to the following: Around 10 employees were at the jobsite along with Gunzelman when Hughes arrived.⁴ The employees looked at Hughes, but did not say anything about the shirt. However, Gunzelman came over and told Hughes to take the T-shirt off. Hughes said he would not do so, and Gunzelman told him that he had to leave the job and go home. Hughes asked if he was being fired, and Gunzelman said no, but he had to go home and take the shirt off before returning to work. Hughes said that if he went home, he would not take the T-shirt off, but that he would come back with the same shirt on. Hughes then left. Half of the employees at the site were not wearing company T-shirts, and one of the employees had a shirt with an Ocean City logo. Around three other employees had noncompany logos on their shirts, although Hughes could not recall what they said. Hughes’ daily log reveals that after Hughes told Gunzelman that Hughes was not going to take off the union shirt, Gunzelman handed out “Primo T-shirts” to everyone but Hughes. Hughes testified that Gunzelman handed Primo shirts out to the five or six people who were not wearing them.

Hughes testified he received a phone call the morning of August 27 at home around 8 or 8:15 a.m. from a woman. The caller said Hughes should not have been sent home, and that he was to return to work the next day. Hughes credibly testified he was told to report to the Naval Academy rather than the Naval Stadium. Thereafter, Hughes wore a union T-shirt to work every day. Hughes’ log reveals the caller was Sandy Barcia, and Hughes was told he would be paid for the day.

a. Respondent’s witnesses

Gunzelman testified he has been with Respondent for 23 years and he was familiar with Respondent’s policies. Gunzelman testified Hughes came to work with a union shirt on. Gunzelman asked Hughes to remove it and wear one of Respondent’s shirts. Gunzelman testified he did this because everyone

³ Both counsel for the General Counsel and the Union stated that they were not placing the lawfulness for Respondent’s solicitation and distribution rule at issue in this proceeding, and counsel for the General Counsel repeated this assertion in his posthearing brief.

⁴ Hughes’ daily log reflects that there were 12 employees on the job.

in his group “pretty much wears the Primo Electric shirt.” Gunzelman reviewed the company manual and testified, “It said that you’re not allowed to wear other types of shirts, just your logo.” However, Gunzelman later testified, as to whether employees wore Primo shirts all the time, “They have them. Sometimes they’re clean.” Gunzelman testified he offered Hughes one of Respondent’s shirts, but he said he would not wear it, so Gunzelman sent Hughes home. When asked if he gave five or six shirts out, Gunzelman testified there were only three people on the jobsite. After he sent Hughes home, Gunzelman reported the incident to the project manager. After that, Gunzelman was told Hughes would be back tomorrow and that he was allowed to wear the union shirt. Gunzelman testified Hughes returned to the jobsite the next day, and that he worked there for the next 2 weeks. Gunzelman testified after Hughes was brought back, Gunzelman made no announcement to the employees that they were allowed to wear union T-shirts. Gunzelman testified he thought Respondent’s policy was employees were required to wear a Primo shirt or a shirt with no writing, or be sent home.

Respondent’s employee handbook states under article 10.10 Dress Code:

Under no circumstances are articles of clothing with logos or any advertisement of any kind, other than IES or Primo, allowed. If you show up for work wearing any of the above, you will be required to change or else you may be sent home for the day.

Contrary to Gunzelman, Perini testified Respondent did not have a uniform policy or T-shirt policy that applied to Hughes. She testified Respondent’s uniform policy applied to people working in Respondent’s Service Division, and that Hughes was not in the Service Division. Perini testified she received a call from Gunzelman’s supervisor, and she was told Gunzelman sent Hughes home for wearing the union shirt. Perini testified she responded Hughes had to be brought back immediately. Perini testified she reviewed her decision with Robert Wilson, Respondent’s president. Perini testified it was she who called Hughes to tell him to return to work on August 28.

I have credited Hughes’ account of what transpired on August 27, over that of Gunzelman. First, Hughes’ account was corroborated by his daily log. The log is fairly detailed, and also contains statements against Hughes’ interest, such as his supervisor telling him he was not working hard and fast enough. Second, since Perini admitted Respondent had no policy requiring field employees to wear company shirts, I find Hughes testimony credible, as affirmed by his log, that there were 10 or so employees at the site, not just three as Gunzelman claimed, and that several of them in addition to Hughes were not wearing one of Respondent’s T-shirts. Moreover, Gunzelman belatedly admitted that the employees did not wear Respondent’s shirts all of the time to work, when he stated that the employees have them, and that “sometimes they’re clean.” In view of Gunzelman’s long tenure with Respondent, I have concluded that at the time he sent Hughes home he was aware that the uniform policy in Respondent’s handbook was not enforced with respect to field employees. Thus, I have credited Hughes’ account of the conversation with Gunzelman in full

over that presented by Gunzelman, and I have concluded that Gunzelman singled Hughes out and sent him home for wearing a union T-shirt, when Respondent admittedly had no policy in effect prohibiting Hughes from doing so.

2. On September 2, Local 24 files an OSHA complaint on behalf of Hughes

Hughes’ log for August 28, shows he was transferred from the Naval Academy Stadium site back to the Naval Academy.⁵ As per his log, on August 29, Hughes was assigned to the Naval Academy practice football field.⁶ The log reveals that Hughes worked alone at the practice football field, with Chip Grady, his new foreman. Hughes’ assignment was to dig holes for the installation of hand boxes to run underground PVC piping. Hughes’ log reveals he started off using a ditch witch to dig the holes. As Hughes dug, he found a two-inch PVC pipe, which was connected to a large transformer. Hughes brought this to Grady’s attention. Hughes states in his log that nothing was marked, and he asked Grady about it. Grady said it was marked a long time ago. Hughes told Grady it should be marked before they performed any trenching. At which point, as reflected in his log, Hughes saw Grady discussing the matter with Gunzelman. As per the discussion, Hughes was told to dig the trench, which was 18 inches deep and 200 yards long by hand. Hughes’ log reveals he asked Grady if Respondent had laborers to do this type of work, and Grady responded we do what we have to do. The log reveals Hughes told Grady that Hughes was placed in a dangerous situation by being required to dig around unmarked electrical pipes, but Grady’s only response was nothing happened to you did it.

Hughes returned to the Naval Academy practice football field On September 2.7 Hughes’ daily log reveals he started digging by hand a trench behind the bleachers. Hughes testified that he notified Lash that he thought there was a safety violation, and that as a result Lash called OSHA. Hughes’ log reveals that an OSHA inspector arrived at the jobsite after lunch on September 2. Hughes testified the OSHA inspector asked Hughes if there was a problem with the underground wiring. Hughes testified that, as he was talking to the OSHA inspector, Grady, Gunzelman, and Gunzelman’s boss William Turner arrived. Gunzelman told Hughes to leave the area and to do his job, which at the time was digging the trench with a digging bar and a shovel. The OSHA inspector told Hughes he could use the shovel but not the digging bar. Hughes testified that, after everyone left, Grady was very upset stating that Grady was going to receive 2 or 3 days off due to the safety violation.

Hughes testified he was fairly sure there was an OSHA violation because where he was trenching there were no marks to show underground meters and pipes. Hughes testified that it was his experience when there were underground cables that go to 13000 volts they have to be marked before digging. Hughes testified that the person from OSHA also prevented him from using the trenching machine or the digging bar.

⁵ I do not credit Gunzelman’s testimony that Hughes remained at the Naval Academy Stadium for 2 weeks after Hughes first wore his union shirt on August 27.

⁶ The Naval Academy practice football field is a different location than the Naval Stadium where Hughes worked on August 27.

a. Respondent's witnesses

Gunzelman testified there was a time OSHA was called on to the job concerning some digging at the site. Gunzelman testified it was reported they did not have a digging permit, although Respondent, in fact, had two digging permits. Gunzelman testified he showed the OSHA official the digging permits and Respondent received no citation. Gunzelman denied Grady was disciplined over the incident. Gunzelman testified he did not know Hughes called OSHA, although he testified, "We'd all sit and speculate about it.". Gunzelman testified Hughes was digging a trench with a shovel. Prior to that he was using a ditch witch. Gunzelman testified there was no possibility of Hughes electrocuting himself since the high voltage wire was not energized. Gunzelman testified Hughes did not talk to him, or anyone else Gunzelman knew of about a safety concern. Rather, Hughes just called OSHA.

I have credited Hughes' testimony, over Gunzelman's, concerning the events leading up to and pertaining to the OSHA complaint, as corroborated by Hughes' daily log. While Gunzelman may have correctly testified Respondent received no citation over the incident, I find Respondent's officials failed to establish to Hughes following his complaint that he was working in a safe work environment. I also do not credit Gunzelman's testimony that he was not aware that Hughes spoke to Grady about Hughes' concerns before OSHA was called. Hughes' log for August 28, reveals that following Hughes' complaint, he saw Grady discussing the matter with Gunzelman, and then Hughes assignment was changed from digging the trench using the ditch witch to digging by hand. Hughes' testimony is confirmed by Gunzelman's admission that he was aware that Hughes was using the ditch witch to dig the trench and then changed to using a shovel. If there was no legitimacy to Hughes' concern, Gunzelman failed to explain why he no longer used the ditch witch for digging the large trench. Gunzelman also testified they had their suspicions as to who filed the OSHA complaint, and I have concluded those suspicions centered on Hughes.

3. On September 3, Hughes is interviewed for an office job

Hughes was assigned to the Naval Academy jobsite on September 3. However, Hughes' log reveals that Gunzelman and Grady sent him to Respondent's Glen Burnie office at 6:30 a.m. on that date with no explanation. Hughes testified that when he arrived, he spoke to Perini with no one else present. Perini said she wanted Hughes to go to the different departments in the building and talk to each person in charge to allow them to see what he knew about Respondent's operations. Hughes testified he met with an estimator, who asked Hughes questions about estimating certain work. Hughes testified he also interviewed for a supervisory position as the interviewer asked him how he would deal with certain problems with men. Another position Hughes testified he interviewed for was assigning men and materials to jobsites, which included giving assignments to foremen.

Hughes testified that he met with four or five people during this interview process and then he met with Perini again. He testified that Perini told him he was being interviewed for the positions and that the salary for these jobs would be between 55

and 75 thousand dollars a year. Hughes testified that he was earning pretty close to this amount working in the field. He testified Perini asked him which job he would be interested in doing, and Hughes replied that he did not want any of them because he did not want to work inside as he preferred working outside with his tools. Hughes testified he considered Perini's asking him what position he wanted to be a job offer. Hughes testified no one explained to him why he was being interviewed for any of the positions. Rather, he was just called into the office and interviewed. Hughes testified, as reflected in his daily log, that during his discussion with Perini, he asked her "if anyone where she works has said to her 'you have to work faster and harder.'" Hughes' log reflects that he told Perini this was said several times to him by his foreman, and he told her that the referenced foreman had no respect for his knowledge, experience, or age. Hughes' log reveals he made these remarks to Perini after the interview process when he told her he would not be interested in any of the jobs.

a. Respondent's witnesses

Perini testified that while Hughes was working at the Naval Academy and the Naval Stadium he was working under Gunzelman who was the superintendent for both jobsites. Perini testified they brought Hughes in to interview for an estimator position, and Hughes did not interview for a supervisory position. Perini testified Respondent did not offer Hughes a position, rather they conducted an interview process and Hughes stated, before any decision was made, that he wanted to stay in the field and work with his tools. Perini testified as follows concerning the reason Respondent interviewed Hughes:

They were arranged, there was a concern, we were trying to accommodate him, basically, I believe, in terms of I got the notice that we would like to interview Mr. Hughes from, from the president, because the president had indicated that he had been told, and again I don't have the full thing on that, I'm going based on what you've just asked me, was that Mr. Hughes had indicated he was having some difficulty working in the field and that we had also, that they had also heard that he had his own business previously, because he had been talking about his experience. I think that's how that came up.

Perini testified Hughes was brought in and she met with him first. Perini testified that during the conversation, she asked Hughes if he understood why he was brought in, and that she understood he was "having some possible difficulty in the field," and that they wanted to see if with his experience they could use him as an estimator. Perini testified Hughes stated he was not as fast as he used to be, but he was steady, and that he wanted to continue working in the field with his tools, without further considering the position. Perini testified that she provided Hughes' employment information to two individuals in Respondent's estimating team and Hughes only interviewed for an estimating position.

I do not credit Perini's testimony that Hughes was brought in for these interviews because alleged reports that he was having trouble working in the field. Hughes was brought in on September 3, shortly after he began wearing a union shirt on August 27, and the Union caused an OSHA investigation on

Hughes' behalf on September 2. The timing strongly suggests that Respondent was attempting to remove Hughes from the field as a result of his union activity. Moreover, Gunzelman, the superintendent in charge of Hughes testified, when asked what type of worker Hughes was that he, "Came to work, did, you know, what he was told to do." Thus, Gunzelman failed to testify that any complaint was lodged about Hughes' job performance prior to the September 3, job interviews. Hughes credibly testified that Perini never told him that he was being interviewed for the positions because he had problems in the field. I have also credited Hughes' testimony that he was interviewed for an estimator position, a supervisory position, and a dispatcher type position.

4. On September 4, Hughes is transferred to the Andrews Air Force Base (AAFB) jobsite

Hughes returned to the Naval Academy on September 4, but his log reflects at the end of the day, he was transferred to AAFB. Foreman Dale Haylett assigned Hughes work at AAFB. Hughes testified that at Andrews, "Basically I raked and shoveled dirt and stones." He testified that laborers, not a journeyman wireman, usually perform this work. Hughes hours at Andrews were 6:30 a.m. to 3 p.m., with a 9 a.m. to 9:15 a.m. break and lunch break from 12 to 12:30 p.m.

On September 9, Hughes wrote in his log "they don't seem to have any problem with me or my affiliation. The men ask questions about the union once in while." Hughes wrote in his log on September 10, "Still digging & still wearing my 'T' shirt." Hughes testified he did not know if any other journeymen electricians were digging stating he never saw the other individuals who dug doing any electrical work. Hughes testified that everyone he worked with was digging and he estimated this was between 9 to 11 people. Hughes testified that he could not talk to these employees, with the exception of an individual named Tito, as they all spoke Spanish. Hughes testified Tito spoke some English, and would translate to the other men for Hughes. However, Hughes also named Ed Kelly as another person who spoke English, but was transferred to another job.⁷ Hughes wrote in his log that on September 12, 13, 15, 17, he was still digging. Hughes log reveals that on September 22, he raked stones all day. On September 24 and 25, Hughes built concrete forms.

On September 26, Hughes listed his work in his log as stripping sidewalk forms, pumping out a manhole, and boarding up sleeves inside. He also states for the first time in his log that he gave out flyers and cards to "several guys." Hughes noted in the log that they asked questions and that Lash may be receiving calls.

5. The September 29 incidents concerning Hughes

Hughes' log reveals that on September 29, he had an incident with Eric Gray. Hughes testified that Gray came over to Hughes and gave him "a bunch of orders." Hughes responded

Gray was not his boss, that Hughes took orders from one boss at a time, and that Dale Haylett was Hughes' foreman. Hughes testified he later found out that Haylett was not there that morning and that Gray took over as foreman. Hughes testified he did not know it at the time. However, Hughes' daily log contradicted Hughes' testimony in that the log states, in reference to Gray, "Had words with guy named Eric. He is a foreman on other jobs but not this one. He started giving orders this morn. To me & others. I questioned his authority & said that he wasn't my foreman. His response was when Dale (my foreman) wasn't around that he became my foreman. I told him that I will only have one foreman at a time. He went away to confer with Dale. This happened two times today." Gray confirmed Hughes refused Gray's instruction. Gray testified he informed Haylett of the incident. I have credited Hughes' log that Gray informed Hughes that Gray was filling in for Haylett, but Hughes responded he would only have one foreman at a time.

Hughes testified another incident took place on September 29. This was between Joe Schlerf and Hughes. Hughes testified as follows: Gray, Tito and three other men were present. The incident took place before lunch. They were pouring concrete into a form they had built for a transformer pad. Schlerf was on the other side of the transformer pad from Hughes, and there were men raking the concrete. Gray was in front of Hughes kneeling down trying to rake the concrete so Hughes could vibrate it down into the form. Hughes had an electric vibrator in his hand, which is used to vibrate the concrete all around the form. Hughes was holding the vibrator with both hands, waiting for Gray, who was raking concrete. Schlerf was on the other side of the form, about 10 to 12 feet away, saying Hughes could not vibrate the concrete with that thing up in the air. Schlerf told Hughes to stick his "dick" into the concrete and get it done. Hughes responded he would put it in Schlerf's ear. At that point, Schlerf walked around the pad towards Hughes. Schlerf stopped a step and one half away from Hughes and said can anyone get this man off the job. Hughes said he had not done anything wrong, why should anyone get rid of Hughes. Schlerf walked away. Haylett came over and Schlerf said he wanted to file charges against Hughes because Hughes threatened him on the job. Hughes testified he felt Schlerf initiated the incident. Hughes typed a report of the incident that night and then gave it to Hogge. Hughes told Hogge he did not know what Hogge heard but his written memo was what happened. Hughes never heard anything else about it. Hughes denied that he was aware, at the time, that the term "dick" is a slang word for the concrete vibrator.

Schlerf testified he was a lead person. Schlerf testified it was around 2 p.m., and they were pouring concrete. They had six or seven transformer pads to pour. They were trying to eliminate overtime, and Hogge said they had to get this done. Schlerf backed the truck in, and was pouring concrete. Schlerf testified Hughes was holding the concrete vibrator in the air, which is known as a "dick" in the field. Hughes was supposed to use the vibrator to vibrate the concrete down into the wire mesh. Schlerf testified he yelled at Hughes telling him to put his "dick" in the cement, and Hughes came "back with something that I'm going to stick this dick in your ear or some-

⁷ Hughes testified that Eric Gray and Joe Schlerf spoke English, but that Hughes did not work with them at the site, except for Gray for 1 day.

thing. Schlerf testified he was hot and there was a lot of tension. Schlerf testified he told Haylett, "what are you going to do about this guy, or something to that effect." Schlerf testified Hogge asked him what happened after Hogge received Hughes' letter. Schlerf testified once you stick the vibrator into the concrete and pull it out; it sprays droplets into your eyes and on your clothes. Hughes had the vibrator up in the air when Schlerf talked to him, and Schlerf testified he was getting splattered. Schlerf testified he was sure Hughes would have known the slang word for vibrator was "dick" because he heard it every day when they were pouring cement. While Gray was called as a witness for Respondent, he did not testify about this incident.

I do not credit Schlerf's assertion that he told Hughes to stick the vibrator into the cement because Hughes was splattering cement while he was holding the vibrator up in the air. Rather, I find that Hughes had not yet dipped the vibrator into the cement at the time of Schlerf's remarks. I have credited Hughes' testimony, as confirmed by Hughes' memo to Hogge, that Gray was kneeling in front of Hughes while Hughes was holding the vibrator in the air. If any cement was splattering it would have hit Hughes and Gray first, as Schlerf testified he was in a truck pouring cement at the time of the incident. I do not credit Schlerf's testimony that Hughes stood there with the vibrator in the air while splattering himself with cement. Moreover, Gray failed to corroborate this assertion. Rather, I find the incident was caused by Schlerf's aggressive posture towards Hughes, which was motivated by Hughes wearing a union shirt. In this regard, Schlerf testified he subsequently instructed Respondent employee witness Clayton Bester to report to superintendent Hogge that Bester had received a union computer disc from Hughes, which subsequently led to Hughes' termination. Schlerf could advance no reason for this instruction to Bester, except that he felt that the superintendent had a right to know what was happening on the job.

6. On September 30, Hughes begins to distribute the Union's computer disc (CDs) to Respondent's employees

Hughes testified he distributed union CDs to some of Respondent's employees in the latter part of September 2003 at the AAFB jobsite. Lash had given the materials to Hughes at the Union hall. Hughes estimated he gave out around 6 CDs. Hughes testified that he gave the CDs out before and after work in the parking area to employees who had computers at home. He testified he asked them if they had a computer, and if they said yes, he asked them if they would like to have one of the discs to play at home. Hughes testified the parking area was off the jobsite and that no work was performed in this area. Hughes denied carrying any of the CDs onto the jobsite. Hughes testified he made entries in his log when he distributed the Union's materials. He denied distributing materials he did not record in his log. The CDs came in a small plastic casing in a set of a small sized DVD and a CD, with each stating on the cover, "Earn What You're Worth." The first entry in Hughes' log for giving out the Union's CDs is on September 30, where

it states he gave out CDs before work. On October 1, the log states that Hughes gave out two CD-ROMs after work.⁸

Hughes' log for October 2, reveals that on that date, his foreman Haylett, who was also a backhoe operator ran over Hughes' lunch box and tools. Hughes wrote in his daily log pertaining to Haylett, "He then asked me if I thought he did it on purpose. I said no but if I thought otherwise we wouldn't be standing here talking." Hughes testified he told Haylett he did not think he did it on purpose in order to avoid a fight because Haylett was coming straight at him. Hughes reported the incident to Hogge, who, on behalf of Respondent, compensated Hughes for the damaged equipment.⁹

Hughes listed his duties in his log from September 29 to October 9, as digging dirt. I have credited the following as drawn of Hughes' testimony and his daily log. Hughes states in his log that on October 7 he was warned by Tito that someone was going to say Hughes was giving out CD's during working hours, which Hughes asserts in the log was not true.¹⁰ Hughes testified he went to Hogge and explained to him that Tito told Hughes that he was going to be fired for giving out CD's. Hogge said he knew nothing about it, but he would look into it. Hughes states in the log Hogge asked why Hughes was in the Union and working for Primo. Hughes testified he told Hogge he was trying to encourage some of the workers to be union electricians and to persuade Respondent to be a union contractor. Hughes testified Hogge told him that Hogge was a union electrician at one time.¹¹

⁸ It states in Hughes' prehearing affidavit, dated May 14, 2004, that Hughes gave out 6 or 7 CD-ROMs during the period he worked at AAFB, which was from early September to the end of September. The affidavit states that Lash gave Hughes the CD-ROMs in early September. However, Hughes testified concerning the affidavit that his daily log was more accurate as to when he gave the CD's out. Hughes testified that whatever days he wrote in his log were the days he gave out the CD-ROMs. I found Hughes' log, as he testified, to have been kept in an accurate fashion, and that he correctly recorded the dates he gave out the Union's disc in the daily log, as set forth above.

⁹ The General Counsel did not allege Haylett's running over Hughes' tools as violative of the Act. I also cannot attribute Haylett's conduct to Respondent. Hughes admitted telling Haylett he did not think he did it on purpose, and Haylett was not alleged to be Respondent's supervisor or agent in the complaint. Respondent also reimbursed Hughes for the equipment.

¹⁰ Hughes testified he had worked a lot with Tito at AAFB, but he did not learn Earnest Bringas was Tito's name until after Hughes was discharged. Tito is Bringas' middle name.

¹¹ I have credited Hughes' testimony, as confirmed in his daily log, as to his conversations with Tito (Bringas) and Hogge, as set forth above. Hughes testified about the conversations in a credible and straightforward fashion. Respondent called Bringas as a witness, who denied telling Hughes he was going to be fired for passing out the CDs. He testified, "No, I never say nothing because, you know, I never involve, you know, with my bosses when they have a meeting. I don't know what--I don't know what happened. I'm an employee, that's it." When asked if he heard anyone say Hughes was going to get in trouble, Bringas testified, "I don't know." Bringas also denied anyone had talked to him about his testimony prior to the hearing. When asked if the lawyers talked to him, he became evasive. Bringas was clearly a frightened witness, and given his status as a current employee called by Respondent to testify, I did not find much he said, on Respondent's

7. Hughes is discharged on October 10

On October 10, Hughes met with Perini and Plitt around 10:30 a.m. in the general foreman's trailer. Hughes testified, "Tito and I had come back down there in the pickup truck to go to the Johnny-on-the-spot, because that's where they were back by the trailers. As I came out of the Johnny-on-the-spot, Mr. Plitt walked over. He says, we have to talk to you in the trailer...". Hughes testified Perini did the talking for Respondent during the meeting. Hughes testified, after he and Plitt entered the trailer, Perini said, "Mr. Hughes, we're going to terminate you today." Hughes asked the reason, and Perini picked up the Union's CD and said, "you were giving these out on the job, and for that reason, we're terminating you."¹² Hughes clarified on cross-examination that Perini said they were going to terminate him because Hughes was giving out CDs to the men on the job, during working hours. Hughes testified he told Perini he did not do it. Perini said they had a written statement from one of your fellow workers stating Hughes was doing it. Hughes asked Perini to name his accuser, but she refused. Hughes testified he said, "I have the right to know who my accuser is." However, Perini again said she was not going to tell him, and he was being terminated for giving the CD's out. Hughes testified he said he wanted the reason for his discharge and the name of his accuser in writing. Perini responded she could not do it there because she did not have her computer to type it up. Hughes said he would take it long-hand, and Perini again refused.¹³ Then Plitt escorted Hughes off the jobsite. Hughes testified no advanced arrangements were made with him for Perini to interview him that day.

Hughes initially denied knowing whom Respondent witness Clayton Bester was. Bester was then brought in the hearing room, and Hughes still testified he could not recall him. Hughes then testified if he had seen Bester, it might have been one time, but he did not remember him. Hughes testified he might have given a CD to Bester, but he did not recall the conversation, as he asked everyone on the job in the morning or in the afternoon after work if they had a computer at home, and then he would give them the CD if they wanted it. However, Hughes subsequently testified he recognized Bester after seeing and hearing him testify. Hughes then testified he gave Bester a CD in the morning before work in the parking area. Hughes testified he asked Bester if he had a computer, Bester said yes and Hughes gave him the disc. Hughes denied giving Bester the CD during working time.

Hughes testified, after recognizing Bester, that he saw Bester possibly five or six times on the jobsite, and that on occasion

Bester ran the backhoe near where Hughes was working, which would last an hour to an hour and one half. Hughes estimated this happened around three times for a total of about 6 hours. Hughes testified he never knew Bester's name, and he only saw him a couple of times before work for a few minutes.

a. Respondent's witnesses' testimony concerning the events leading to Hughes discharge

Clayton Bester, a backhoe operator and electrical apprentice, had been working for Respondent for 5 years, at the time of his testimony. He testified that he worked with Hughes at the AAFB jobsite, and interacted with him more than 20 times there. Bester testified the morning of September 24, before work at the trailer near the parking lot Hughes asked Bester if he had a computer, to which Bester replied he did. Hughes said he had something to give to Bester. However, Hughes did not give it to Bester at that time. Bester testified that, around 8:15 to 8:30 a.m. on September 24, Bester was working with Bringas and Hughes. Bester was operating a backhoe backfilling a switch. Bester testified Hughes stopped him from working by holding up the CD. Bester stopped the backhoe, got off of it, and Hughes gave him the CD. Bester asked Hughes what was on the CD and Hughes told him wage information. Bester testified Hughes also told him the difference between the Union's wages and the wages they were receiving and the conversation was 5 or 6 minutes. Bester testified it was during working time and at a working place when Hughes gave him the disc. Bester testified Bringas was about 20 to 25 feet away and he did not know if Bringas was watching them converse.

Bester testified he took the Union's CD home that night and threw it in the trash because Bester was not a computer person. Bester testified he went to the trailer the next day to sign in and Joe Schlerf, an operator, and Hogge, the job superintendent, were there talking about the Union's CD. They were the only two in the trailer. Bester testified Schlerf asked Bester if he had one of the CD's, and Bester said he did but he threw it in the trash. Hogge then told Bester to bring it in the next day because he wanted to give it to Perini. Bester testified he did not think either of them asked him what time of day he received the CD from Hughes.

Bester testified he retrieved the Union's CD from home that night, and brought it in the next day and gave it to Hogge. Bester testified that when he gave it to Hogge, Bester also wrote a statement, which he dated September 24. Bester initially testified that Hogge asked him to write the statement on September 24, "the day I brought the CD-ROM in." Bester then testified that September 24, at 8:30 a.m., was the date and time Hughes gave him the disc, and the statement was made a day later, which would have been September 25. Bester then changed his testimony again stating the statement was made two days later on September 26. Bester testified Hughes gave him the CD on September 24, and he gave the handwritten statement to Hogge on September 26, which was also the date he gave Hogge the CD. Bester testified when he brought the CD in, Hogge gave Bester some paper and told him to write down what happened and to sign and date the statement. Hogge told Bester he was giving the CD to Perini. Bester testified he gave the CD to Hodge, not Schlerf, but that Schlerf was

behalf, to be worthy of belief. Respondent also called Hogge as a witness, and he did not deny having the above-described conversation with Hughes.

¹² Hughes testified Perini asked him if he was distributing CD-ROMs, but she posed the question after she told him she was going to fire him.

¹³ Hughes testified on direct exam that Perini gave him a check, during the meeting, to pay off his remaining wages. However, on cross-examination the following day, Hughes testified that after checking with his wife, he did not receive a check at that time, rather it was subsequently mailed to him.

in the trailer at the time.¹⁴ Bester identified his statement dated, September 24, and testified it is in his handwriting. Bester testified Hogge said he wanted the statement because he said, "you can't solicit during company time. Well, not solicit, but to give that out-- talk about the Union during company time." Bester's signed handwritten statement reads:

09/24/03
8:30 a.m.

Ernest Bringas, myself, and Bill

We were backing filling switch pads when Bill talk to me about. That is when he gave me the disc.

Bester gave a typewritten affidavit, dated May 3, 2004, taken by Respondent's attorney Aaron Walters. Bester testified that, during the meeting, Walters told him that Hughes was fired for distributing the CD on work time. Bester testified Walters gave no other reason for Hughes' discharge.

Bringas had been working for Respondent for 4 years, at the time of his testimony. Bringas is a journeyman electrician. Bringas testified that Tito is his middle name. Bringas met Hughes at AAFB as they worked together there for about 3 to 5 weeks. Bringas testified that Hughes gave Bringas one of the Union's CD's. Bringas could not recall where he was or whether Hughes gave it to him before or during work. When asked where he was when Hughes gave him the CD, Bringas testified, "Well, they give it to me I don't know nothing about CD. I don't know nothing about computer, you know. I just take that like everybody they get it." Bringas testified that Hughes, "tried to tell me lot of things, but I not pay attention, you know. I don't know. I thinking, you know, maybe he try to watch my mind--my mind, I don't know." Bringas testified when he received the CD he threw it in the trash, "because I don't know how to use it. I don't know what it does." Bringas testified he never saw Hughes give the CD to Bester, and he did not know if Hughes gave it to Bester.

Schlerf was working for Respondent for close to 4 years at the time of his testimony. Schlerf is an equipment operator. He also testified he considered himself to be a lead person at the time they were working at AAFB in October. Schlerf testified he was aware Hughes was active in the Union. He testified, "there was the scuttlebutt, he was passing literature or a disk or something around. I mean everybody was aware of it." Schlerf testified that, while they were in the field, Bester told Schlerf that he had received a disk from Hughes. Schlerf testified he told Bester he should let Hogge know what happened and he should give Hogge the disk. Schlerf did not recall the time of day of this conversation. Schlerf told Bester to tell Hogge because Schlerf felt that, as superintendent, Hogge should know what was happening on the job. Schlerf did not know whether Hughes passing out the CD was a violation of Respondent's rules, which is why he suggested Bester let Hogge know. Schlerf testified Bester did not give Schlerf the

CD, stating, "I don't remember seeing it or getting, or getting a CD-ROM."

Hogge was the job superintendent at AAFB and he worked there almost 4 years at the time of the events in question.¹⁵ Hogge testified at AAFB there were up to six foremen below Hogge, with 8 to 25 electricians, depending on the workflow. Hogge testified Bester came in to Respondent's trailer and told Hogge he received the CD from Hughes, and that it was passed out during working time or working hours. Hogge testified Project Manager Steve Shilling was the only other person present in the trailer when Bester reported Hughes' activity.¹⁶ Hogge testified Bester had the CD in his hand the first time he walked in and told Hogge about it. Hogge testified that was the only time he discussed it with Bester and Bester gave the CD to Hogge at that time. Hogge did not ask Bester to give a statement at that time. Hogge testified he contacted superintendent Richard Plitt the same day and Plitt told Hogge that Plitt contacted Respondent Vice-President John Hall, who contacted Perini. Hogge testified he asked Bester to give a statement 3 or 4 days after Bester gave Hogge the CD because Hogge received a call from Hall, who asked Hogge to have Bester write a statement. Hogge testified Bester was in Hogge's office when Hogge told him to make out the statement. Hogge testified Bester made his hand written statement in front of Shilling, in Shilling's office. Bester gave the statement to Hogge, who gave it to Plitt.

Respondent employed Plitt as a project manager at the time of his testimony. Plitt worked for Respondent as a field superintendent in the fall of 2003. Plitt testified Perini and Plitt went to the AAFB jobsite on October 10 to clarify information about CDs being passed out on the job. Plitt made no special arrangements to make sure Bester or Hughes were available. When they arrived at the site, Plitt brought Bester in from the field to Respondent's trailer. Plitt testified Perini questioned Bester who said he received the CD from Hughes "during working hours or working time." Plitt testified, "Basically, we asked him if he was working at the time, when the CD was given to him, which he said yes." Plitt did not recall what work Bester was doing when he received the CD. Plitt testified that, after meeting with Bester, Plitt picked Hughes up from the field and brought him to the trailer where Perini spoke to Hughes in Plitt's presence. Plitt testified she asked Hughes if he had been giving the CDs to the employees, to which Hughes said yes. Perini asked if Hughes had been doing it during working time, and Hughes said no. Perini asked Hughes that question a second time, and he denied it again, and then he was terminated. When he was told he was discharged, Hughes asked for a written statement setting forth the reasons from Perini. Plitt testified that, "other than that, he agreed and we escorted him off base." Plitt testified Hughes was told he was terminated for lying to Perini.

Perini testified it was solely her decision to discharge Hughes and the only reason was because he lied during her investigation. Perini testified Respondent has a policy against

¹⁴ However, Bester stated in a sworn affidavit, dated May 3, 2004, taken by Respondent's counsel that he gave the disc to Joe Schlerf. Bester testified the affidavit was incorrect that he gave it to Hogge, but Schlerf was there, "so I gave it to both of them."

¹⁵ It appears that Respondent no longer employed Hogge at the time of his testimony.

¹⁶ Hogge testified Shilling no longer worked for Respondent.

dishonesty set forth in its handbook, and that all dishonesty is a terminable offense. Perini also testified that Hughes was a poor employee but that was not the reason he was discharged, and that Hughes' job performance had nothing to do with his termination.

Perini testified she was first made aware Hughes was distributing union materials in the "first part of October," and she testified she thought the actual date was October 4 when she received a call from Hall. Perini testified Hall told her one of the employees had produced the Union's CD, and Hughes was distributing it. Hall told her there had been some concerns with Hughes' job performance, and they had just heard he had been distributing during working hours. Perini responded she would investigate it. Perini testified she began her investigation on October 4, by requesting that Bester provide a written statement and that it be forwarded to her. Perini testified she received the written statement around 2 days after she requested it. However, Perini later testified it was within a couple of days after Hall's call that she requested Bester provide a written statement. Perini testified the only other thing she did concerning the investigation, prior to her arrival on the jobsite on October 10, was to review Hughes and Bester's files.

Perini arrived at the AAFB site around 9 or 10 a.m. on October 10, and she met with Schilling and told him she needed to use Respondent's trailer to conduct an investigation.¹⁷ Schilling was not involved in the investigation. Perini testified that, after

¹⁷ Perini later testified she met with Hall on the morning of October 10, and that was when she received the Union's disc. Perini had the disc during her meetings with Bester and Hughes. Perini testified when she met with Hall, he informed her there was an incident where Hughes refused to take orders from Eric Gray. Hall also told Perini of an argument between Schlerf and Hughes over the use of a vibrator on the site. She testified she asked no questions about this incident as it was handled at the job and she was told it had been resolved. Perini saw Hughes memo about what occurred on the site at that time. Perini gave no other specifics about any other performance problems concerning Hughes that had been reported to her by Hall. Perini failed to investigate any alleged performance problems for Hughes, or question him about it. Respondent presented several witnesses as to Hughes' alleged performance problems. Hogge testified he received reports of performance concerns of Hughes of not doing what he was asked to do, and working very slow. Hogge also testified he was aware there was an incident between Schlerf and Hughes, which they handled among themselves, and Hogge knew very little about. There was no claim that Hogge ever thought the alleged performance problems by Hughes warranted disciplinary action, that he confronted Hughes about them, or that he recommended any action be taken. In fact, as per Perini's testimony, the only time the alleged performance problems were reported to her was when Respondent's officials became aware that Hughes was distributing the Union's disc to its employees. Respondent witness Haylett testified he spoke to Hogge a couple of times about Hughes' performance concerning the pace of his work, and he asked Hogge what they were going to do in that no one wanted to work with Hughes. Haylett testified Hogge's response was they were going to look into it, and Hogge later told Haylett he talked to someone and they were going to see what they could do. I found Haylett's claims concerning Hughes' performance to be exaggerated and not worthy of belief, since no one from management ever talked to Hughes about these alleged problems. I also do not credit Respondent witnesses Schlerf, Gray, and Mark Graham's claims of performance problems by Hughes, which were never specifically reported to nor investigated by Perini.

meeting with Schilling, she met with Bester in the trailer for around 45 minutes. Plitt was also in attendance. Perini had Bester verify his written statement. Perini testified she asked Bester when the incident occurred, and he said it was during working time. Bester said they were working as a crew and as Bester was getting off the backhoe Hughes approached him. Perini testified they were doing some work with holes, but she could not specifically recall the work. Perini testified she was told one other person was working on the crew. She testified Bester stated Hughes gave him the disc as he was getting off the backhoe. Perini testified she asked Bester whom he gave the disc to, and he responded Schlerf. Perini testified she did not know whether Bester gave the disc to Schlerf during working time. Perini testified it was her understanding Schlerf, not Bester, turned the disc into Hogge.¹⁸ Perini testified she thought Bester told her the incident with Hughes occurred on September 24.

Perini met with Hughes after her meeting with Bester. Plitt was also present. Perini testified Hughes appeared defensive during the meeting in that he said he gave the disc out at 6:15 a.m. when he was getting out of his car. When Perini asked if he was absolutely sure he did not distribute the disc during working time, Hughes said he did not lie.¹⁹ Perini testified she did not credit Hughes based on his body language and the way he gave his response. Perini told Hughes she had a written statement, and Hughes demanded to know who gave it. Perini said she was not going to divulge that information. Perini told Hughes she was going to terminate his employment that day. Hughes asked why and Perini responded for falsifying information during an investigation. Perini testified if Hughes had indicated he was soliciting during working time, he would not have been fired, but just given a warning. Perini testified the sole reason she discharged Hughes was because he lied to her concerning whether he gave the disc out during working time, as Perini elected to believe Bester's version of the incident.

Perini testified Bester named Bringas as the third individual who was present when Hughes gave Bester the disc. Perini testified she did not think it would have been prudent to talk to Bringas, "given the circumstances." Perini did not ask if Bringas was on the site that day, as she did not consider him to be part of the incident. Respondent's records reveal Bringas was on the site. She testified she had only pre-planned to meet with Bester and Hughes. Perini testified if she was going to interview someone; it would have to be pre-arranged. Perini testified she made no arrangements to interview Bringas before arriving at the site on October 10, although she made arrangements to interview Bester and Hughes. Perini testified she did not expect to have to meet with Bringas.

Perini testified that with sexual harassment cases, she has never fired anyone without providing them with the name of their accuser. However, Perini testified she did not provide Hughes with Bester's name because she felt there would be a form of retaliation given the topic of Hughes' distribution.

¹⁸ Perini testified to her knowledge, Bester gave the disc to Schlerf, who gave it to Hogge, who gave it to Hall, who gave it to her.

¹⁹ Perini was not sure, but she thought she used the term working time, not working hours, while talking to Hughes.

Perini testified Hughes was never told Bester was his accuser or that Bringas witnessed the incident. Perini testified Hughes asked several times who his accuser was, and Perini told him that she was not going to divulge that information.

b. Credibility

I have credited Hughes' version of the discharge meeting, and have also credited his testimony that he did not distribute the Union's disc to Bester during working time. In this regard, considering his demeanor, I found Hughes to have testified in a straight forward manner concerning the events leading to his discharge, while I found the testimony of Respondent's witnesses to be internally inconsistent and contradictory on points the witnesses should have remembered.

Hughes testified he gave Bester the disc before work in the parking lot. Bester admitted Hughes approached him before work concerning the disc, but then contended Hughes only gave him the disc after they were working on a project when Hughes held up the disc signaling Bester to stop operating and get off his backhoe to talk to Hughes. While Bester named Bringas as a witness in Bester's written statement, and Bester described a situation that, if it occurred as described, Bringas would likely have noticed the transaction, Bringas, who was called as a witness by Respondent, failed to confirm that it took place.

The testimony of Respondent's witnesses was also contradictory as to the circumstances leading Bester to provide Respondent's officials with the Union's disc and under which Bester gave his handwritten statement leading to Hughes' discharge. Bester testified Hughes gave him the disc on September 24 and Bester threw it out that night while at home. He testified that, while reporting to work on September 25, Superintendent Hogge and Schlerf were in Respondent's trailer where Schlerf asked Bester if Hughes had given him the disc, at which point Hogge told him to bring it in. Bester testified he did not believe he was asked at that time whether Hughes gave him the disc during working time. Rather, Hogge just told Bester to bring the disc in. Bester testified he brought the disc in on September 26, and gave it to Hogge, who again was in the trailer with Schlerf. However, Bester testified in an affidavit taken by Respondent's counsel that Bester had given the disc to Schlerf rather than Hogge. Bester thereafter attempted to conform his testimony at the hearing with that in the affidavit by now stating that he gave it to Hogge, but since Schlerf was in the office, Bester in fact gave the disc to both of them. Of course contrary to Bester, neither Schlerf nor Hogge placed Schlerf in the trailer when Bester first talked to Hogge about the disc, or when Bester gave Hogge the disc. Schlerf testified he was working in the field when he told Bester to give Hogge the disc. Schlerf also testified Bester did not give the disc to him, and that he never saw the disc. Hogge testified that Project Manager Steve Shilling, not Schlerf, was in the trailer with Hogge when Bester turned the disc in, and again when Bester gave his handwritten statement. Hogge also testified that, based on instructions from above, he asked Bester to give a statement 3 or 4 days after Bester turned in the disc contradicting Bester's testimony that he gave the statement the same day he gave Hogge the disc.

Perini gave a fourth version as to whom Bester turned the disc into and when its receipt was reported to Respondent. Perini testified she learned Hughes was distributing the disc based on a phone conversation with Hall, which she testified she thought took place on October 4. Perini testified she requested Hall that Bester provide a written statement on October 4, and it was forwarded to her around 2 days after she requested it. Thus, contrary to Bester, who testified he provided a written statement on September 26, Perini's testimony reveals Bester was not asked to provide a statement until at least October 4. Perini also testified that when she met with Bester, he told her that he turned the disc into Schlerf, which was contrary to the testimony of Hogge, Schlerf, and for the most part Bester.

The contradictory stories of Respondent's witnesses serve to undercut Bester's veracity as to circumstances in which he received the disc, and under which he turned it in. First, Hughes testified according to his logbook, he did not begin distributing the discs to Respondent's employees until September 30, not September 24 as Bester claimed. Perini's statement that she was first informed of the disc around October 4, and she was the one who requested that Bester make a statement, which she did not receive until 2 days after October 4, serves to corroborate Hughes claim that he started distributing the disc at a later point in time than asserted by Bester. Moreover, Bester testified when Hogge first asked him to bring in the disc, Bester was not questioned as to whether Hughes gave it to him during working time. Thus, Respondent's officials had no reason for requesting the disc from Bester other than to keep track of Hughes and its employees' union activities. The circumstances in which Bester was directed to bring the disc in by Hogge, and then to provide a signed statement in Respondent's trailer occupied by Hogge and project manager Shilling also seem somewhat coercive, particularly given the varying accounts of Respondent's witnesses as to what took place.

I also do not find Perini's explanation for her failure to interview Bringas, who Bester had named as a witness in his signed statement and again during his meeting with Perini to Hughes providing him the disc, to be very convincing. Plitt, who separately picked up Bester and Hughes at the jobsite, testified he made no advanced arrangements to obtain either employee, a point that was corroborated by Hughes, who also testified he was with Bringas when Plitt picked him up. I do not credit Perini's claims that advanced arrangements were needed to interview these employees, that she had a concern that interviewing Bringas would be disruptive to the work, or that she could divine to her satisfaction based on her limited interviews of Bester and Hughes who was telling the truth without interviewing Bester's named witness. Rather, I have concluded, as Hughes testified that he was told by Perini at the outset of their meeting that she had made up her mind to discharge Hughes for circulating the Union's CD to Respondent's employees, even before hearing Hughes version of events, which was further corroborated by Perini's admission that she had no plans to interview Bringas even before she heard what Bester and Hughes had to say.

It was also Perini's testimony that the only reason she discharged Hughes was for lying during an investigation.²⁰ She testified that if Hughes had admitted distributing the disc on working time, he would have received a warning, but would not have been discharged. Hughes on the other hand credibly testified Perini told Hughes he was being discharged for giving out the Union's disc on the job during working hours. Respondent witness Bester's testimony serves to corroborate Hughes on this point. Bester testified he met with Respondent's attorney Aaron Walters on May 3, 2004. Bester testified during the meeting, Walters told Bester that Hughes was discharged for giving Bester the Union's disc during working time, and this was the only reason Walters gave for the discharge. I find Walter's admission to Bester serves to corroborate Hughes' testi-

mony as to what Perini told him was the cause for his discharge, and further undercuts Perini's version of events.²¹

I have considered, but do not find as persuasive, Respondent's arguments in its brief to discredit Hughes as to the events leading to his discharge. I do not find the sheer number of Respondent's witnesses testifying against Hughes to be as convincing as Respondent suggests, given the contradictory statements between these witnesses concerning key points of the case. I also find it more than a coincidence that both Respondent witnesses employees Bester and Bringas admitted accepting a disc from Hughes, but also testified they had no interest in its content. Based on the demeanor of each of these witnesses, and the content of their testimony, I have concluded they were aware of Respondent's anti-union stance, and it impacted on their testimony, as they did not wish to receive a fate similar to Hughes.

Respondent also contends, in its brief, that Hughes should be discredited because he testified he was assigned to jobs at AAFB where he was working with only employees who did not speak English. Respondent argues that Hughes eventually admitted he worked with three employees at the site who spoke English, and contended he purposely could not recall the names of anyone else he worked with to prevent his testimony from being further challenged in support of its contention that he should be discredited. However, Hughes testified he worked closely with one Hispanic employee named Tito, who spoke some English. Hughes did not learn Tito's full name was Earnest Bringas, until after Hughes was discharged. Hughes testified that Bringas would interpret for him when he wanted to converse with other Hispanic employees. Hughes had no reason to fabricate about his lack of knowledge of Bringas' full name, and I have concluded that given the nature of the assignments at the site, that Hughes never knew the names of most of his co-workers. Hughes testified he worked a couple of times with another individual named Ed Kelly who was transferred to another location. Hughes acknowledged that Eric Gray and Joe Schlerf spoke English, but testified he did not work with them. Obviously, Hughes did work with Gray on at least one occasion, as he testified Gray attempted to give him orders as a substitute foreman. Hughes also testified he worked with Schlerf at least once as they had an argument over Hughes' use of a vibrator. However, I find that the tenor of Hughes' testimony was that, for the most part, he felt he was working with Spanish speaking employees. I do not find his failure to know the names of his co-workers, or that there were exceptions to his claims of isolation to be sufficient to discredit his testimony concerning the events leading to his discharge, for which he testified in a straightforward fashion and for the

²⁰ Perini initially testified that dishonesty always warrants that an employee be discharged. Respondent's handbook in section 6.2 lists dishonesty as one of a series of offenses that "may subject the employee to disciplinary action, up to and including termination." Thus, there was no requirement in the handbook that an employee automatically be discharged for every instance of dishonesty. I also do not find as persuasive Respondent's examples of other employees who were discharged for alleged dishonesty as comparable to Hughes' situation. Perini cited as one example an employee who she concluded had filed a false report against a supervisor in possible retaliation for a written warning from the supervisor. She cited as other examples three employees who were terminated based on Respondent's determinations they had falsified their employment applications by omitting convictions. Respondent listed another employee who falsified his application in terms of his prior work history. After the employee reported to work, it was discovered he had bad knees. He worked only 2 days, and then failed to report. Perini placed the reasons for the discharges of three of these employees in their termination letters. She failed to do so for Hughes, although he specifically requested the reason for his termination be put in writing, thereby treating Hughes in a disparate fashion from others she has discharged, and making it very difficult for him to appeal his termination. Perini cited another employee, who Perini testified under that employee's watch around 60 employees had not designated beneficiaries for their life insurance. Perini testified the employee had lied to her about the situation, which Perini testified was the cause of the employee's discharge, as opposed to the employee's underlying job performance. However, Perini testified she wrote unsatisfactory job performance rather than dishonesty on the employee's termination form, in order to protect the employee's privacy because she had been a long term employee. I do not credit Perini's testimony here. The state unemployment hearing examiner's decision found the employee was disqualified for benefits because she was discharged for gross misconduct in that there were forty separate occurrences where employees were not enrolled in Respondent's benefit program. Nothing is mentioned in the portion of the decision submitted into evidence by Respondent that dishonesty played a roll in the discharge. Perini's termination letter to the employee states the cause of discharge was due to "unsatisfactory job performance." Yet, Perini claimed this was not the real reason for the employee's discharge, claiming the employee was discharged for dishonesty and Perini was just trying to protect the employee from office gossip. Perini's harsh stance that all instances of dishonesty are dischargeable offenses is somewhat inconsistent with Perini's admittedly placing a false reason for an employee's discharge in that employee's termination letter. Perini did not follow this strict policy of termination when it came to her own conduct.

²¹ I do not credit Perini's testimony that Respondent President Wilson had no input in the decision to discharge Hughes. Perini testified she reviewed her decision with Wilson to return Hughes to work after Hughes wore a union shirt, and it was at Wilson's directive that Hughes was interviewed for office positions after the Union filed an OSHA complain on Hughes' behalf. Perini's testimony reveals Wilson was heavily involved with decisions concerning Hughes after Hughes union status became known, and I do not credit her claim that she discharged Hughes without first seeking Wilson's approval.

most part with good recall, which was corroborated by his daily log, as well as by admissions in the testimony of Respondent's witnesses, as set forth above.

Respondent also points to several other alleged inconsistencies on the part of Hughes at the hearing, such as the timing of when he received the Union's CDs from Lash, his initial claim not to have first recognized Bester, and his initial testimony that he received his final paycheck at his termination meeting with Perini. I do not view Hughes' changes in testimony on these points to undercut those portions of his testimony I have credited. Rather, I find Hughes' testimony changed in certain areas over the course of the trial as his memory was refreshed by his review of his daily log; his seeing and hearing Bester testify; and through his investigation at home as to when he received his final paycheck. I do not find, considering his demeanor, that Hughes' made misstatements with an intent to fabricate.

8. Analysis

a. Legal principles

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management, Inc., v. NLRB*, 462 U.S. 393 (1983), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee or employees, employer knowledge of that activity, and antiunion animus on the part of the employer. *Wal-Mart Stores*, 340 NLRB No. 31 (2003), slip op. at 2. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089. That burden requires a respondent "to establish its *Wright Line* defense only by a preponderance of evidence." *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

It has long been held, as stated in *Hahner, Foreman, & Harness, Inc.*, 343 NLRB No. 133, JD slip op. at 7 (2004), that:

... it may be found that where an employer's proffered non-discriminatory motivational explanation is false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Motivation of union animus may be inferred from the record as a whole, where an employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. *Union Tribune Pub. Co. v. NLRB*, 1 F.3d 486, 490-492 (7th Cir. 1993). Direct evidence of union animus is not required to support such inference. *NLRB v. SO-White Freight Lines, Inc.*, 969 F.2d 401 (7th Cir. 1992).

In *Washington Nursing Home*, 321 NLRB 366, 375 (1996), it was stated that:

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1990), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital del Maestro*, 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).²²

In *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1124 (2002), the timing of discharges on the heels of union activity and evidence of disparate treatment resulted in a finding that the reasons advanced for the termination of employees Saylor and Lamp were pretextual and that they were terminated for their union activity.

In *NLRB v. Burnup & Sims*, 379 U.S. 21, 23, (1964), the Court held that an employer who terminates an employee in the mistaken belief that misconduct occurred in the course of protected activity violates the Act, even where the employer is acting in good faith on that mistaken belief. See also *Keco Industries*, 306 NLRB 15, 17 (1992).

b. Hughes' October 10 discharge

Respondent hired Hughes, a journeyman wireman with a master electrician's license, on August 11. Hughes began working in the field on August 12 at Respondent's Naval Academy site, where he revamped temporary lights and outlets. On August 19, Hughes was transferred to Respondent's Naval Stadium site. Gunzelman, a foreman/superintendent and admitted supervisor, had overall authority over both sites. Hughes worked on skyboxes at the stadium where he installed fluorescent lighting and hooked up heaters and air conditioners.

On August 27, Hughes reported to work at the Naval Stadium wearing a Local 24 T-shirt. Hughes' credited testimony reveals that around 10 employees were present, along with Gunzelman, when Hughes reported to work. Hughes refused Gunzelman's directive to take the union shirt off, and Gunzelman sent him home. Around five or six employees besides Hughes were not wearing Respondent's T-shirts, and around four of those employees had logos other than Respondent's logo on their shirts. Gunzelman handed out Respondent's shirts to all the employees except Hughes, who were not wearing them. Hughes was sent home, but received a call from one of Respondent's officials later in the day stating that he should not have been sent home, that he was to return to work the next day and would be paid for the day. However, Hughes was told to report to the Naval Academy on August 28, rather than the Naval Stadium jobsite. Based on admissions by Perini and Gunzelman, as well as Hughes' credited testimony I have concluded Respondent had no uniform policy in effect prohibiting Hughes from wearing a union T-shirt, and that Gunzelman's

²² See also, *Promedical Health Systems, Inc.*, 343 NLRB No. 131 (2004); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117 (2004), JD slip op. at 31 (2004); and *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

sending Hughes home, although outside the Section 10(b) of the filing of the current charge, in the presence of a large number of employees because Hughes wore a union T-shirt constitutes background evidence of animus based on disparate treatment towards Hughes' union activity.²³ I do not find Respondent's phone call to Hughes on August 27, informing him that he should not have been sent home, that he would be paid for the day, and that he should report to work the next day at a different jobsite negates a finding of animus on the part of Respondent. There was admittedly no publication of a retraction of Gunzelman's conduct to the 10 or so employees at the site who witnessed Hughes being sent home, and Hughes failure to return to the jobsite where the transgression occurred could only have the foreseeable coercive effect against future participation in union activities on the part of those employees. Particularly, where Respondent gave no assurances to those employees or to Hughes that Respondent would not interfere in the future with their exercise in Section 7 rights. See, *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978).

Following the incident on August 27, Hughes continued to wear his union shirt every day at work until the termination of his employment on October 10. On August 29, Hughes was transferred to a new site the Naval Academy practice football field. Hughes credited testimony reveals that on August 29, his foreman instructed Hughes to use a ditch witch to dig a trench about 200 yards long and 18 inches deep. Hughes pointed out to the foreman that he was digging around unmarked electrical pipe, which Hughes protested was a safety violation. The foreman, upon consultation with Gunzelman, informed Hughes to dig the trench by hand, rather than using the machine. On September 2, Hughes reported back to the same site, and he was instructed to continue to dig by hand. Hughes phoned union official Lash, who contacted OSHA concerning the alleged safety violation that Hughes was being required to dig around unmarked electrical pipe. The OSHA inspector arrived at the site, and was speaking to Hughes, when the foreman, Gunzelman, and Gunzelman's superior arrived at the scene, at which point Gunzelman told Hughes to leave the area and return to his job. Gunzelman testified Respondent's officials had their suspicions as to who filed the OSHA complaint. I find, based on Hughes' credited testimony, that he had voiced a safety complaint to his foreman, who discussed Hughes' complaint with Gunzelman, and that Respondent's officials concluded that Hughes filed the OSHA complaint, or that it was filed on his behalf. Moreover, I have concluded that since Hughes was sent home just 7 days earlier for wearing a union shirt, which he continued to wear to work, that Respondent's officials surmised that Hughes' OSHA complaint was part and parcel of his union activity.

On September 3, Hughes was instructed to report to Respondent's office, where he met with Perini, and then was interviewed by several of Respondent's officials. It was Hughes' understanding that he was being interviewed for multiple posi-

tions, including an estimator's job, a supervisory position, and some type of dispatcher. He testified that following the interviews, Perini told him the salary, and asked which job he would be interested in doing. Hughes testified he considered Perini's question to be a job offer. Hughes told her he would not be interested in any of the jobs, but preferred to continue to work with his tools in the field. Perini testified she received the instruction to put Hughes through the interviews from Respondent's president because Hughes had "indicated he was having some difficulty working in the field. . . ." However, when Gunzelman was asked, while on the stand, the type of worker Hughes was he testified that Hughes came to work and did what he was supposed to do. Thus, I have concluded that Respondent by attempting to entice Hughes into taking an office job was attempting to remove Hughes from the field on September 3, because he had begun wearing a union shirt on August 27, and because an OSHA complaint was filed on his behalf by the Union on September 2. I have concluded that in doing so, Respondent was attempting to isolate Hughes from the remainder of its work force because of his union activity. I have concluded that, although this conduct was outside of the Section 10(b) period for filing a charge, that it may be considered as background evidence of animus on the part of Respondent towards Hughes' union activity.²⁴

On September 4, Hughes was notified he was being transferred to the AAFB jobsite as of September 5. From that time forward, Hughes who was 61, diagnosed with asbestosis, and using an inhaler three to four times a day in plain view on the jobsites was required to basically shovel dirt until his discharge on October 10, although prior to his wearing a union shirt at work Hughes had been assigned electrical work, which according to Gunzelman he was performing in a satisfactory fashion.

On September 30 and October 1, Hughes' credited testimony reveals he gave out around six of the Union's CDs to Respondent's employees either before or after work. Hughes asked the employees if they had a computer at home, and if so, if they wanted one of the discs. Hughes credibly testified he gave Respondent witness Bester one of the CDs in the parking area before work.²⁵

On October 10, without warning, Plitt summoned Hughes to Respondent's trailer where Hughes met with Perini. Hughes credibly testified Perini told him at the outset of the meeting that they were going to terminate him today. When Hughes asked the reason, Perini told him he was giving out the Union's CD to men on the job during working hours. Hughes testified he denied Perini's assertion to which Perini responded they had

²⁴ See *Wilmington Fabricator, Inc.*, supra, and *Kaumograph Corp.*, supra.

²⁵ As set forth in more detail in the credibility section, including considerations of demeanor, I have not credited Bester's claims as to the date, time of day, and circumstances in which he received the disc from Hughes and thereafter tendered it to Respondent's officials. Respondent witness Bringas failed to confirm Bester's assertion that Bester received the disc during working time. Moreover, the testimony of Respondent witnesses Perini, Hogge, Schlerf and Bester was inconsistent as to the circumstances and timing in which Bester tendered the disc to Respondent's officials and as to how and when he gave his signed statement concerning his receipt of the disc from Hughes.

²³ A respondent's actions outside the Section 10(b) period can be considered as background evidence of animus towards union activity. See *Wilmington Fabricator, Inc.*, 332 NLRB 57, 60 fn. 6 (2000), and *Kaumograph Corp.*, 316 NLRB 793, 794 (1995).

a written statement from one of his co-workers. Perini refused Hughes' request to provide the name of his accuser or to provide him the reasons for his discharge in writing.²⁶

I find that the General Counsel has made a prima facie case that Hughes was discharged for engaging in protected Union activity under the Board's *Wright Line* analysis. Respondent was aware of Hughes' pro-union status on August 27, when he wore a union shirt to work and displayed animus towards Hughes' union activity by discriminatorily sending him home for wearing the shirt in the presence of several co-workers. When Hughes continued to wear a union shirt, and contacted OSHA through the Union on September 2, Respondent reacted again by seeking to offer him employment on September 3 that would have removed him from fieldwork thereby attempting to isolate him from the employees he was trying to organize. When Hughes refused to bite at the offer, he was immediately transferred to the AAFB site where he was required to shovel dirt for most of the remainder of his employment, although up until he had announced his pro-union status on August 27, he according to Gunzelman, had been performing more skilled electrical work in an adequate manner. Respondent's actions serve to color in a negative fashion its pronouncement in its employee handbook that, "Primo will resist any efforts to bring a union into the Company by all legal means at its disposal."

On September 30 and October 1, Hughes began to distribute the Union's CD at the jobsite both before and after work to Respondent's employees. Respondent's officials quickly learned of Hughes' activity. Schlerf, who described himself as a lead man, directed Bester to tell superintendent Hogge that Hughes had provided him with the disc. Hogge then told Bester to bring the disc in, while according to Bester not even questioning Bester as to whether Hughes gave him the disc during working time. Perini testified she directed Hall to have Bester provide a written statement on October 4, which Bester gave in a trailer occupied by two management officials. While Bringas was named as a witness to the incident in Bester's written statement, Perini testified that even prior to meeting with Bester and Hughes she had no intent and made no plans to interview Bringas. Thus, Perini treated Hughes differently than another employee she named, who Perini testified was terminated for filing a false report against his supervisor. Perini testified she obtained signed statements from all the witnesses to the underlying incident before discharging that employee. Contrary to Hughes, Perini did not discredit the other employee's account until all witnesses were heard from.²⁷ Perini

also testified that during her discharge meeting with Hughes, she refused Hughes' request to tell him the name of his accuser, and she failed to inform him that Bringas was named as a witness to the event. Yet, Perini testified when she discharges employees based on claims of sexual harassment she always informs them of the names of their accuser. Perini testified she refused to inform Hughes of the name of his accuser because she felt that there would be some retaliation. Perini's sole justification for this conclusion was, "the circumstances under which the distribution was about." Perini provided no testimonial support for this alleged fear other than the fact that Hughes was engaging in union activity. Thus, Perini admittedly discriminated against Hughes in the manner in which she conducted her investigation for similarly situated employees because Hughes was engaged in union activity. Perini also refused Hughes' request to provide the reasons for his discharge in writing impacting on his ability to appeal that decision, although she has placed the reasons for dismissal in letters of other employees she has terminated.

I find that Hughes was discharged on October 10, 2003, in violation of Section 8(a)(1) and (3) of the Act. I have concluded that the General Counsel has established a prima facie case under *Wright Line* of knowledge, animus, and timing of the discharge pertaining to Hughes' union activities, and that the reasons Respondent advanced for the discharge were pretextual. Perini's disparate treatment of Hughes, her failure to adequately investigate Bester's claim, along with Respondent's other actions towards Hughes concerning his union activity demonstrate Respondent harbored strong animus toward that activity. Additionally, while Perini testified she informed Hughes that the reason for his discharge was lying during an investigation, Respondent witness Bester credibly testified that on May 3, 2004, Respondent's attorney Walters told Bester that Hughes was discharged for distributing the Union's CD during working time. Such a statement by counsel constitutes a shifting position as to the cause of discharge taken by Respondent's representatives, and constitutes further evidence the reasons provided for the discharge were pretextual. I also find that, under all the circumstances here, including the manner in which she conducted her investigation that Perini had determined to discharge Hughes before meeting with Bester and Hughes, and that she did not have a good faith belief that Hughes distributed the CD during working time at the time she informed him he was discharged. I find that, in fact, Hughes did not distribute the CD during working time, and that even if Perini had a good faith belief that he did, Hughes' discharge would nevertheless be unlawful because he was engaged in protected union activity without participating in any misconduct. See, *NLRB v. Burnup & Sims*, 379 U.S. 21, 23, (1964), and *Keco Industries*, 306 NLRB 15, 17 (1992).

²⁶ I have credited Hughes' version of the meeting over that of Perini and Plitt for reasons explained in the credibility section of this decision.

²⁷ I find cases such as *ATC/Forsythe & Assoc.*, 341 NLRB No. 66, slip op. at 2 (2004), cited by Respondent to be distinguishable from the facts present here. There an employee was found to be lawfully discharged, although the investigation by the employer was found to be "less than ideal." However, it was noted that there was no persuasive evidence that any shortcomings in the investigation were motivated by union animus. It was also noted that the employee was discharged for failing to report an accident, whereas the need to investigate concerned the accident itself. In the present case, there is other background evidence of animus to Hughes' union activities, and Hughes was discharged for allegedly lying during an investigation in circumstances

where Perini prior to conducting her investigation determined it was not necessary to interview all witnesses to the underlying event. In doing so, she acted in a disparate fashion to another employee who, as set forth above, was also charged with lying, and I have concluded she was motivated to shortchange Hughes' investigation because of his union activity.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) and (3) of the Act by on or about October 10, 2003, discharging employee William Hughes because he engaged in union activities.

2. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged employee William Hughes must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from October 10, 2003, the date of Hughes' discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

ORDER

The Respondent, Integrated Electrical Services, Inc., d/b/a Primo Electric, Glen Burnie, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in union activities.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee William Hughes full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make William Hughes whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of William Hughes and within 3 days thereafter notify Hughes in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the

Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by Region 5, post at its facilities in Glen Burnie and Lanham, Maryland, the Naval Academy and Naval stadium jobsites in Annapolis, Maryland, and the Andrews Air Force Base jobsite in Camp Springs, Maryland, if the Respondent is still working at these sites copies of the attached notice marked "Appendix."²⁹ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent on or after October 10, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 10, 2005

APPENDIX

Notice To Employees

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge employees because they engage in activities on behalf of the International Brotherhood of Electrical Workers, Local 24, AFL-CIO, or any other labor organization.

²⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days of the Board's Order, offer William Hughes full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make William Hughes whole for any loss of earnings and other benefits he may have suffered as a result of the

unlawful discrimination against him in the manner instructed by the National Labor Relations Board.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of William Hughes and within three days thereafter notify him in writing this has been done and the discharge will not be used against him in any manner.

INTEGRATED ELECTRICAL SERVICES, INC., D/B/A PRIMO
ELECTRIC